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No. 80-1435

In the Supreme Court of the United States

OCTOBER TERM, 1980

ARMY AND AIR FORCE EXCHANGE SERVICE, PETITIONER

v.

JAMES O. GORMAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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The narrow question presented by this case and its companion, *Army and Air Force Exchange Service* v. *Sheehan*, No. 80-1437 (filed Feb. 23, 1981), is whether an appointed employee of a military exchange who has been discharged may file a civil action for monetary damages against the United States under the Tucker Act (28 U.S.C. 1346(a)(2)) predicated upon an implied-in-fact contract. As we demonstrated in our petition in *Sheehan* (80-1437 Pet. 4-14), the court of appeals' holding that Tucker Act jurisdiction may be invoked in such a situation is inconsistent with this Court's decisions in *United States* v. *Hopkins*, 427 U.S. 123 (1976), and *United States* v. *Testan*, 424 U.S. 392 (1976). Respondent Gorman's arguments in response are entirely unpersuasive.

1. Respondent's contention (Br. in Opp. 5-6) that the decision in *Hopkins* supports the court of appeals' decision in this case and in *Sheehan* is mistaken. Respondent to the

contrary, the Court in *Hopkins* did not "uphold[] the right of Hopkins * * * to bring his action under the Tucker Act" (Br. in Opp. 6). Instead, the Court held (427 U.S. at 130) that further proceedings were necessary because the record was insufficient to establish whether Hopkins "was employed by virtue of a contract," in which case jurisdiction would lie under the Tucker Act, or "by appointment," in which case the Tucker Act presumably would afford no basis for jurisdiction over Hopkins' claim.

Respondent is not aided by the Court's statement in *Hopkins* that "[p]laintiff's allegation that his discharge constituted a breach of a contract of employment was sufficient, under the provisions of Pub. L. No. 350, to withstand the Government's motion to dismiss the complaint on the grounds of lack of jurisdiction in the Court of Claims, and the judgment of the court so holding is therefore affirmed." 427 U.S. at 130. Unlike the complaint in *Hopkins*, respondent's complaint does not allege that he was employed pursuant to a contract with the exchange service or that "his discharge constituted a breach of a contract of employment" (*ibid.*).[1] As we noted in our petition in *Sheehan* (80-1437 Pet. 9 n.8), subsequent to this Court's decision in *Hopkins*, the Court of Claims has, on two occasions, dismissed suits for back pay brought by discharged exchange service employees under the Tucker Act on the ground that the complaints failed to allege facts establishing a contract relationship and that therefore the court was without subject matter jurisdiction over the actions. See *Spooner* v. *United States*, 211 Ct. Cl. 312 (1976); *Richardson* v. *United States*, 214 Ct. Cl. 757 (1977). Accordingly, we submit that, consistent with *Hopkins*, the complaint in this case was not sufficient to withstand the government's motion to dismiss.

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[1]Similarly, the complaint in *Sheehan* does not allege that Sheehan's discharge was contrary to an employment contract (see 80-1437 Pet. App. 8a).

2. Respondent contends (Br. in Opp. 8) that this case is distinguishable from *United States* v. *Testan, supra,* because, unlike the plaintiffs in *Testan,* who asserted that they had been erroneously classified, respondent claims that he was wrongfully discharged. The Court in *Testan* did indeed differentiate between a suit seeking reclassification and one "concerning a wrongful discharge or a wrongful suspension." 424 U.S. at 402. In the latter situations, the Court observed that, "at least since the Civil Service Act of 1883, the employee is entitled to the emoluments of his position until he has been legally disqualified." 424 U.S. at 402, citing *United States* v. *Wickersham,* 201 U.S. 390 (1906).

But the protections of the Civil Service Act are not applicable here. As we pointed out in our petition in *Sheehan* (80-1437 Pet. 6 n.5, 12-13), pursuant to 5 U.S.C. (Supp. II) 2105(c), exchange service employees are specifically excluded from coverage under the Back Pay Act, 5 U.S.C. (& Supp. III) 5596, and (with several exceptions not pertinent here) from coverage under other statutes administered by the Office of Personnel Management (formerly the Civil Service Commission).[2]

3. In its brief opinion in this case the court of appeals noted (Pet. App. 2a) that it held in *Sheehan* that the district court had subject matter jurisdiction "under a confluence"

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[2]The predecessor to Section 2105(c), 5 U.S.C. (1964 ed.) 150k, was enacted in order to allay doubts raised by this Court's decision in *Standard Oil Co.* v. *Johnson,* 316 U.S. 481 (1942), "as to whether or not the various Civil Service laws and regulations were applicable to civilian employees of non-appropriated fund activities." *United States* v. *Forfari,* 268 F. 2d 29, 32 (9th Cir.), cert. denied, 361 U.S. 902 (1959). See S. Rep. No. 1341, 82d Cong., 2d Sess. (1952); H.R. Rep. No. 1995, 82d Cong., 2d Sess. (1952). As originally enacted, the statute provided that civilian employees of nonappropriated fund instrumentalities "shall not be held and considered as employees of the United States for the purpose of any laws administered by the Civil Service Commission * * *." 5 U.S.C. (1964 ed.) 150k.

of 28 U.S.C. 1331(a), 28 U.S.C. 1346(a)(2) and 5 U.S.C. 702. On the basis of this reference, respondent appears to assert (Br. in Opp. 7, 9) that the court of appeals concluded that 28 U.S.C. 1331(a) and 5 U.S.C. 702 help to confer jurisdiction in the district court over his claim for monetary relief. This apparent assertion is incorrect.

The court in *Sheehan* held (80-1437 Pet. App. 11a) that 28 U.S.C. 1331(a) is not by itself a waiver of sovereign immunity but that such a waiver may be found in 5 U.S.C. 702 for claims seeking equitable relief. However, as the court below recognized (80-1437 Pet. App. 12a), Congress in Section 702 expressly declined to waive sovereign immunity over monetary claims. By its terms, Section 702's waiver provision applies only to federal court actions "seeking relief other than money damages."

4. Finally, respondent argues (Br. in Opp. 10) that his complaint alleges a due process violation and that, under *Davis* v. *Passman*, 442 U.S. 228 (1979), and *Carlson* v. *Green*, 446 U.S. 14 (1980), this allegation is sufficient to support a cause of action for damages against the United States. But waivers of sovereign immunity must be "unequivocally expressed" (*United States* v. *King*, 395 U.S. 1, 4 (1969)), and there is nothing in the Due Process Clause of the Fifth Amendment that waives the immunity of the United States to be sued for damages. See *Duarte* v. *United States*, 532 F. 2d 850 (2d Cir. 1976). Both *Davis* and *Green* were actions against individual federal officials, not against the government or one of its agencies, and any adverse money judgment in those cases would have been paid by the officers personally and not by the federal government. Those cases thus provide no support for respondent's argument. In short, as this Court concluded in *Testan*, *supra*, "[i]n a suit against the United States, there cannot be a right to money damages without a waiver of sovereign immunity, and we regard as unsound the argument * * *

that all substantive rights of necessity create a waiver of sovereign immunity such that money damages are available to redress their violation." 424 U.S. at 400-401.

For the foregoing reasons and for the reasons stated in our petition for a writ of certiorari in *Army and Air Force Exchange Service* v. *Sheehan*, No. 80-1437, the petition for a writ of certiorari should be granted, the judgment of the court of appeals should be reversed, and the case should be remanded to that court with directions to dismiss, for lack of jurisdiction, those portions of the complaint seeking monetary relief.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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